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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ----------

JEROME FELD,

Petitioner,

v.

THE UNITED STATES,

Respondent,

Petition for a Writ of Certiorari To The United States Court of Claims

---

Jerome Feld, Petitioner, respectfully requests that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled cause.

Petitioner further states that on January 17, 1969, he did cause to be filed a application for a extension of time to file for said petition for a writ of certiorari. Such time limitation has been extended by a order of the Honorable Chief Justice of the Supreme Court until April 13, 1969.

OPINION TO BE REVIEWED,
DELIVERED IN THE COURT BELOW

The opinion delivered by the court below is in the United States Court of Claims No. 217-66, decided November 15, 1968 and set out infra in the appendix at page A-1.

JURISDICTION

As ground on which to invoke the jurisdiction of this court, petitioner relies on Title 28 U. S. Code, Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this court within the meaning of Rule 19 are:

The opinion of the Court below decides an important question of Federal law, which has not been, but should be settled by this court.

QUESTIONS PRESENTED FOR REVIEW

1. Was it a violation of due process of law to discharge a federal career employee without authority of law, since it took effect as a result of a decision and failure to review on appeal, both of which occurred while a allegation of discrimination which related to the discharge action had been filed but not brought to a conclusion.

REGULATION INVOLVED

Title 5, Code of Federal Regulations, Section 771.222 clearly provides that such discharge prior to review and termination is improper.

CONSTITUTIONAL PROVISIONS INVOLVED

Ammendment 5:
"No person shall be ..... deprived of life, liberty, or property without due process of law ...."

STATEMENT

Petitioner, a career civil service employee, was employed with the Navy Department as a engineering technician No. 90 A 31286, at the Naval Applied Science Laboratory, Brooklyn, New York.

Plaintiff had filed a discrimination action requesting a hearing. This complaint was filed on or about November 4, 1964. Subsequently, on November 25, 1964, plaintiff was notifiied of his proposed separation for medical reasons. To this date there had been no hearing on his discrimination complaint, nor on the date of his eventual discharge. Petitioner was then discharged from his employment for alleged medical reasons on February 11, 1965. Hearings on his complaint of discrimination were eventually held on March 23 through April 1, 1965. Such hearing and evidence were reviewed by the Navy Department and after receiving a adverse decision from them, such ruling was appealed by the petitioner to the President's Commission, who turned it over to the Board of Appeals and Review of the Civil Service Commission, acting as the review body. A decision unfavorable to the petitioner was handed down by the Board on October 20, 1965.

It was after this ruling on his dismissal that plaintiff did cause the action to be brought before the court of Claims. In his initial complaint before this Court plaintiff clearly states that he felt his position was terminated because of discrimination practices, which were reviewed as stated above. At his hearing pending his medical discharge plaintiff did state and make part of the record his convictions that his proposed medical separation was the result of his filing a complaint in November, 1964, alleging discrimination.

Immediately upon his discharge petitioner did file a timely appeal with the Navy Department. After the time alloted and since the Navy took no action on his appeal, he did in accord with regulations remove his appeal to the New York Regional Office of the Civil Service Commission.

Notice of docketing and probable jurisdiction for plaintiff's appeal on his discharge was given by the commission on April 16, 1965. On May 10, 1965, the commission informed the plaintiff that it was without jurisdiction in his case since there was no adverse action which to appeal and therefore he had no further recourse to administrative remedies.

Despite this misleading information, petitioner on May 14, 1965, sent a letter directly to the Board of Appeals and Review of the Civil Service Commission complaining of the action taken by the N. Y. Regional Office and requesting review and clarification.

There was no reply and finally after the adverse decision on his discrimination complaint of October 20, 1965, plaintiff sought relief in the courts. A petition was filed by counsel on behalf of petitioner under Title 28 U. S. Code Section 1941, in the Court of Claims on June 23, 1966. The petitioner felt that he had in good faith exhausted all of his administrative remedies and did seek judgment for the alleged unlawful termination of his employment. The Court by its order of November 15, 1968 (infra appendix p. A-1) did deny petitioner a trial on the merits.

REASONS FOR GRANTING THE WRIT

The gravamen of the Court of Claims opinion was ..... . " that there is no credible evidence that plaintiff appealed from the May 10, 1965 decision of the N. Y. Regional Office of the Civil Service Commission". In reaching its conclusion the court completely disregards the evidence presented and accepts the trial commissioner's report verbatim. In doing so it disregards established rules of law and evidence.

" The judgment of the Court of Claims as to the legal effects of the ultimate circumstantial facts in a case may be reviewed by the Supreme Court".

U. S. v. Pugh, 99 U.S. 265, 25 L ed. 322.

The Court of Claims simply overlooks the legal facts that the petitioner in his original petition filed with the court states that the basis of his discharge did stem from reasons of discrimination. The respondent on the other hand has never denied the fact that the October 20, 1965 adverse decision in petitioner's discrimination action was reviewed by and the decision given forth by the Board of Appeals and Review of the Civil Service Commission.

Hence it would appear that in reality the highest administrative agency did in fact review petitioners discharge from federal employment. There can be no logic or legal reasoning to indicate that petitioner did not exhaust all administrative remedies prior to seeking redress in the courts.
" When the Court of Claims sends as part of its finding of facts, all of the evidence on which such essential facts were found and there is no legal evidence to establish such fact, the Supreme Court must reverse such judgment".
U. S. v. Clark, 96 U. S. 37 -24 L ed. 696.

The court of Claims gives no legal reasoning for not accepting the sworn testimony of plaintiff or accepting the affidavits of Messrs. Goins or Gennone, sworn into evidence upon motion of the respondent. It denies the testimony of the F. B. I. expert, brought in at the request of the respondent, when this expert testifies that there is no proof to indicate that the documents and the evidence are not exactly what they are purported to be.

"Where reliability and truthfullness of witnesses are in no way impugned and they have no self interest to gain or lose and nothing contradicts their testimony, trial court could not disregard such testimony".

Reed v. Murphy, 232 F 2d. 608 . 77 S. Ct. 45. 352 U. S. 831.

It then becomes apparent that:

1 - Plaintiff did appeal the N. Y. Regional Office's decision of May 10, 1965 to the Board of Appeals and Review of the Civil Service Commission, in a letter dated May 14, 1965. (Plaintiff's exhibit number 4. Tr. p. 10 et seq.).
2- Said letter (Plaintiff's exhibit 4) was posted in the United States mails on or about May 14, 1965. Tr. p. 10) see also affidavits of Messrs. Goins and Gennone, introduced into evidence by the respondent and contained in defendant's exhibit No. 11.
3- No evidence has ever been put forth by the defendant to indicate that said letter is not exactly what it is purported to be and was in fact prepared and posted on the date specified.(Tr. p. 74)
4- Judicial notice is taken that the defendant is the United States and the postal service is an agency thereof.
5 - Upon posting, said letter came under the exclusive care, control and dominion of the defendant.
6- Said letter is presumed to have been delivered to the addressee. (Jones v. U. S. 226 F 2d. 24 (1955)
See also Charleson Realty Co. v. U. S. (U. S. Court of Claims No. 388-62, decided October 13, 1967 and cases cited therein.
7 - That the Board of Appeals and Review of the U. S. Civil Service Commission is the final administrative authority (5 CFR 831. 107 (a) and that the petitioner did in good faith exhaust his administrative remedies within the purview of current regulations and did in fact make a timely appeal as provided in CFR 831. 107 (a).

It now would appear that a Federal court having before it a valid complaint and cause of action arbitrarily refuses hearing such cause on its merits. In so doing the court dismisses the action without citing any substantial factual or legal reasoning.

Petitioner does submit that the court's ultimate findings (infra appendix p. A-1) is clearly erroneous when measured by applicable decisional

law, as well as Rule 52 (a) F. R. C. P.

As to the evidence presented, the following clearly supports petitioner's viewpoint.

" Where testimony of a witness was unimpeached and uncontradicted, and its credibility was in no manner brought into question, the judge could not reject such testimony or find contrary thereto".

U. S. v. Johnson C. A. Tex. (1953)
208 F. 2, 729

"Although a trial judge does not have to believe a witness if there is reasonable cause not to believe him, a trial court may not arbitrarily reject the testimony of a witness whose testimony appears credible".

Gee Chee On v. Brownell
C. A. Tex. (1958) 253 F. 2d 314.

Petitioner further states that he was separated as a result of discriminitory practices.
"Where it arises under the Fifth Amendment to the Constitution ... that federal action is responsible for discriminitory practices in labor relations and such discrimination deprives citizens of life, liberty or property without due process of law, such federal action is repugnent to the Constitution.

Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 156 F. Suppl. 89. 78 S. Ct. 266. 355 U. S. 893, 2 L ed. 191.

CONCLUSION

Such decision of the Court of Claims is erroneous in fact and law and can now only conflict with the Constitution as well as established law and rules of evidence.

It now leaves the law unsettled and uncertain. To grant a Writ of Certiorari would settle these points of law, remove the uncertainty, make clear the

rules of evidence and the rights of litigants in federal administrative and court decisions.

Wherefore, it is respectfully submitted by petitioner that a writ of certiorari be granted in this case.

Respectfully submitted,

Jerome Feld
Petitioner

JEROME FELD
1116 Ave. H.
Brooklyn, New York
11230

A-1

IN THE UNITED STATES COURT OF CLAIMS

No. 217-66

Jerome Feld

v.

The United States

Before Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skeleton and Nichols, Judges.

Opinion

Per Curiam: This case was referred to Trial Commissioner Roald A. Hogenson with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57 (a). The commissioner has done so in a opinion and report filed on February 16, 1968.

Exceptions to the Commissioner's findings and recommended conclusion of law were filed by the plaintiff and the case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court agrees with the Commissioner's opinion, findings and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case.

Therefore, plaintiff is not entitled to recover and the petition is dismissed.

BY THE COURT

Wilson Cowen
Judge

November 15, 1968

COMMISSIONER'S ULTIMATE FINDING OF FACT

Upon careful review of the entire record and upon consideration of the demeanor of the witnesses, it is concluded that there is no credible evidence that plaintiff appealed from the May 10, 1965 decision of the Civil Service Commission's New York Regional Office, and that there was no abuse of discretion by the Board in denying as untimely plaintiff's request of March 31, 1967, that the Board entertain an appeal.

Roald A. Hogenson
COMMISSIONER

February 16, 1968

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

BY THE COURT

Wilson Cowen
Judge

November 15, 1968

IN THE UNITED STATES COURT OF CLAIMS

Jerome Feld
430 Williams Ave.
Brooklyn 7, N. Y.

Plaintiff

v

The United States

Defendant

PETITION

1. On November 25, 1964, plaintiff was notified of his proposed medical disability discharge from his career employment position as Engineering Technician, Badge No. 90A 31286, GS-07/06, at the Applied Science Laboratory of the U. S. Naval Station, Brooklyn, New York.

2. The hearing requested by the plaintiff was held December 18, 21-24, 1964.
Pursuant thereto, on February 4, 1964, the Commanding Officer of the Applied Science Laboratory made final the decision that the plaintiff be discharged, same to be effective February 12, 1965.

3. Plaintiff wrote the Commanding Officer on February 4, 1964, requesting that his separation be postponed until a decision had been made on his pending charge of religious and political discrimination which attributed the separation action to bias. The request was denied by letter of February 11, 1965.

4. Timely appeal from the discharge order was made to the Department of the Navy, but no action was forthcoming. It was withdrawn and submitted to the Civil Service Commission.

5. Shortly thereafter, plaintiff filed a application for disability retirement with the Bureau of Retirement and Insurance of the Civil Service Commission.
6. Notice of docketing and probable jurisdiction for plaintiff's appeal of his discharge was given by the Commission on April 16, 1965.
7. On May 10, 1965, the Commission informed plaintiff that it was without jurisdiction because there was no "adverse action" from which to appeal. Such was the case said the letter, because disability retirement had been granted; and the Applied Science Laboratory had then ammended the Notice of Personnel Action to read "Disability Retirement" instead of Separation Disability, thereby changing "the nature of the action".
8. Hearings on plaintiff's allegations of discrimination were held March 23 through April 1, 1965. The decision of July 14, 1965, with its finding of no discrimination was appealed to the President's Commission on Equal Employment Opportunity, who turned it over for review to the Board of Appeals and Review of the U. S. Civil Service Commission, which sustained the holding below on October 20, 1965.
9. Plaintiff submits that the Commission erred in finding that there was no adverse action from which to appeal, since the disability separation order cost him his job and compelled him to seek disability retirement in order to protect his rights thereto.
10. Plaintiff submits that his separation was without authority of law and invalid, since it took effect as a result of a decision and failure to review on appeal both of which occurred while a allegation of discrimination which related to the discharge action, was under consideration; and that such is in contravention of the clear mandate of 5 CFRs771. 222.

11. Plaintiff submits that his discharge was unlawful because the Navy Department failed to consider his appeal as required by 5 CFR (s) 711. 220.
12. Plaintiff submits that his discharge was unlawful because it was made pursuant to notice defective for the following reasons:
(a) No supporting medical evidence was attatched as required by NCPI 352. 4-7 (c) (1) (b).
b. It was not sufficiently detailed.
13. Plaintiff submits that his discharge was unlawful and invalid because it was accomplished pursuant and procedurally defective for the following reasons:

(a) Failure to allow a postponement when plaintiff's representative became unavailable during the course of the hearing.

(b) Failure to allow plaintiff sufficient time to prepare his summation.

(c) Denial of plaintiff's requests for key witnesses (Dr. Spitzer, Mr. Jesse Gibson, Mr. Fried, Mrs. F. Robinson).

(d) Denial of the plaintiff's request for the file in the Lukosevicus case.

(e) Job site inspection by the hearing committee by management at which plaintiff was not represented.

(f) Removal of witnesses before relevant questioning and cross examination had been concluded.

14. Plaintiff submits that his discharge was arbitrary and capricious in that:

(1) other employees are performing similar or more strenuous functions despite physical disabilities.

(2) other employees with impaired physical conditions were not placed on limited duty status, or if they were, they were removed therefrom upon presentation of a physicians note and that such course was not followed in the plaintiff's case.

15. Plaintiff submits that his disability discharge is not supported by substantial evidence.

WHEREFORE, the premises considered, plaintiff respectfully requests judgment against defendant for loss of salary from February 12, 1965 to date, minus disability retirement benefits so far received, in such amount as this court shall deem proper under its rules.

Respectfully submitted,

CARL L. SHIPLEY
Attorney for Plaintiff
1204 National Press Bldg.
Washington, D. C. 20004

OF COUNSEL:

Shipley, Akerman & Pickett
1204 National Press Bldg.
Washington, D. C. 20004

IN THE UNITED STATES COURT OF CLAIMS

Jerome Feld,

Plaintiff,

v.

No. 217-66

The United States

Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S REPLY TO PLAINTIFF'S EXCEPTIONS TO THE COMMISSIONER'S REPORT.

Filed: June 25, 1968

Pursuant to Rule 58 (B) (iii) of the Rules of the Court of Claims, plaintiff submits herewith his response to defendant's reply to plaintiff's exceptions to the Commissioner's report. Plaintiff respectfully submits that defendant's reply filed herein on May 15, 1968, completely ignores the central issue upon which this case now rests.

This is the question of the credibility of the plaintiff's testimony, the weighty supporting evidence thereto; and the substantiating affidavits of two witnesses to the preparation and posting of plaintiff's exhibit number 4. (letter from plaintiff to BAR dated May 14, 1965).

It is submitted that defendant is attempting to divert the attention of the Court from the central issue by interjecting and emphasizing the completely meaningless (and undisputed) fact that certain exhibits were typed on one typewriter, whereas others were typed on a different machine.

Clearly then as a matter of law, to say nothing of logic and common sense, if defendant can offer nothing better for argument, this issue must be resolved in plaintiff's favor.

To put it in the vernacular, defendant is kicking a dead horse. No issue exists that could possibly cast doubt on the credibility of plaintiff's presentation. In fact the government's own expert witness (Mr. Marshall) actually substantiates plaintiff's testimony.

Plaintiff freely admitted to owning several typewriters (Tr p. 18-19). It must therefore follow, that there was nothing in Mr. Marshall's testimony for plaintiff to refute since he (Mr. Marshall) conceded (Tr. p. 74) that there was no evidence whatsoever to show that plaintiff's exhibit number 4 was not precisely what it was purported to be; a timely appeal to the BAR. Plaintiff submits that this court is therefore, obliged to accept the aforesaid exhibit and the resulting conclusion that plaintiff had in fact exhausted his administrative remedies as required by law.

The government also implies a sinister inference from plaintiff's failure to appear at the second trial session of November 27, 1967. Nothing plaintiff submits could be a grosser distortion of the facts.

The general substance of Mr. Marshall's testimony was known to plaintiff's counsel beforehand, who saw no need then and sees no need now to require his client to make another trip to Washington, when there could not possibly be anything further to say on the subject.

Plaintiff could not then and can not now refute Mr. Marshall's testimony, because there is nothing to refute.

Plaintiff has not and does not question Mr. Marshall's veracity in the slightest. What is most vigorously challenged is the materiality of his entire testimony as it bears on the genuineness of plaintiff's exhibit number 4.

Lastly, the government offers feeble argument why the substantiating affidavits of Messrs. Goins and Gennone should be ignored. The fallacy here of course is that these affidavits are in evidence on the governments own motion. (Tr. p. 51).

In effect government counsel is now trying to impeach her own witnesses, a shocking disregard for the established rules of evidence.

Had the government wished to, the affiants could easily have been subpoenaed as they are presently employees of the Navy Department and have been for many years. Why should plaintiff bear this burden? Surely he can not be expected to do more than prove his case beyond a reasonable doubt, which the record shows he has already done.

Were there any showing that the plaintiff or the two affiants were known perjurers or some sort of psychopaths, we would have a different situation.

Since this is not the case, failure of the Trial Commissioner to give credence to plaintiff's testimony and to the affidavits can not be other than arbitrary and hence erroneous.

CONCLUSION

Clearly in law or fact the issues are at once clear. The government has not presented a shred of credible evidence to support what few contentions they make. Instead it seems to rely on attempts to confuse the issues. It clutches at straws and strays far and wide from the issues at hand like the four winds.

In short it says nothing which can be truly substantiated by the transcribed record of the trial now before this court.

For the foregoing reasons coupled with those submitted in his exceptions filed herein May 7, 1968, plaintiff respectfully renews his submission that the Trial Commissioner's report be rejected and the court render judgment that plaintiff has exhausted his administrative remedies in the above entitled cause as required by law and is now entitled to his day in court for trial on the merits of his petition.

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for Plaintiff

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IN THE UNITED STATES COURT OF CLAIMS

Jerome Feld

Plaintiff,

v.

No. 217-66

The United States

Defendant

PLAINTIFF'S EXCEPTIONS TO COMMISSIONER'S REPORT AND BRIEF ON THE FACTS AND THE LAW

Pursuant to rule 58 of the rules of this court, plaintiff submits herewith his exceptions to the Commissioner's report, filed herein on February 16, 1968 and his (plaintiff's) brief on the facts and the law.

Plaintiff specifically excepts to the Commissioner's finding of fact Number 22 (Ultimate finding of fact). Plaintiff excepts to this finding on the ground that it completely ignores inherently credible evidence to the contrary, i.e., that plaintiff did in fact appeal from the May 10, 1965, decision of the New York Regional Office to the Board of Appeals and Review of the Civil Service Commission. This premise is more fully developed in plaintiff's following brief.

BRIEF ON THE FACTS AND THE LAW

The controlling issue in the Commissioner's report, as plaintiff interprets it, is that plaintiff's exhibit number 4 (letter from plaintiff to BAR dated May 14, 1965) is unworthy of credibility and hence by inference is a sham and a fraud. If however, the Commissioner had elected to accept plaintiff's exhibit number 4 for what it is purported to be (a timely appeal to the BAR) then his ultimate finding of fact and his recommended conclusion of law would

unquestionably have been just the reverse of what they were. It would therefore, necessarily follow that plaintiff had in fact exhausted his administrative remedies prior to initiating litigation in this court.
Accordingly, this brief addresses itself primarily to the issue of credibility of witnesses and evidence.

At the outset it must be noted that plaintiff was fully aware of the gravity of his submission of his exhibit number 4 and knew that if he were attempting to perpetrate a fraud upon the court, the consequences would be most serious (Tr p. 42). Surely, it must seem highly unusual for a educated man to deliberately falsify evidence in a civil proceeding and thereby run the awesome risk of imprisonment for perjury. Moreover, there is in the record independent credible evidence to further attest to the genuineness of plaintiff's exhibit number 4, quite aside from plaintiff's own sworn testimony.

At the trial session of September 8, 1967, plaintiff offered into evidence plaintiff's exhibits (for I. D.) number 5 and 6 (Tr. p. 11 and 12) which were affidavits of Messrs. Goins and Gennone. Defendant's counsel objected to the introduction of these items on the grounds of hearsay, which was sustained by the Commissioner (Tr. p. 45-46). Later in the proceedings, these items were admitted into evidence as part of defendant's exhibit number 11(Tr. p. 51). This fact was commented upon by plaintiff's counsel at the time and noted in the record by the Commissioner (Tr. p. 51-52).

It is therefore, quite clear that Messrs. Goins and Gennone's affidavits are in evidence and properly before the court for consideration.

Plaintiff therefore, submits that the Trial Commissioner's ultimate finding of fact and his resulting conclusion of law is erroneous when measured by applicable decisional law, as well as Rule 52 (a) F. R. C. P.

The following citations clearly support plaintiff's premise that such errors exist, and although they

deal with the issue of credibility as respects a appellate court's reversing a trial court, the relationship between this Court's Trial Commissioner and the court itself is virtually synonymous.

"An appellate court may reverse, where findings of the trial court are without substantial evidence to support them, where the trial court misapprehended the effect of the evidence and if, though there is evidence which is credible would be substantial, the effect of the testimony considered as a whole convinces the appellate court that the finding is so against the great preponderance of credible testimony that it does not reflect the truth and right of the case".

U. S. v. Kaplan
C. A. 5th, 277 F. 2d 405 (1960)

"A finding is clearly erroneous (within the purview of FRCP 52 (a) when, though there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed".

Orvis v. Higgins,
C. A. 2nd, 180 F 2d 537 (1950)

In the case at bar, the only evidence whatever offered by the defendant was the F. B. I. technician's testimony that several of plaintiff's documents were typed on the same typewriter and that others were typed on different typewriters (Tr. p. 69.)
This insignificant trivia was not disputed by plaintiff who readily admitted to owning more than one typewriter (Tr p. 17-19) Indeed, plaintiff even offered to allow defendant to examine any or all of his typewriters if they wished (Tr p 24-25). To reject plaintiff's credibility, to say nothing of the two affiants, merely because the same typewriter was used in preparing several different documents can not be other than arbitrary, and:

" A finding without substantial evidence to support it (a arbitrary and capricious finding) does violence to the law".

Federal Radio Comm. v. Nelson Bros.
289 U. S. 266, 270.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Trial Commissioner's ultimate finding of fact and recommended conclusion of law be rejected by this Honorable Court and the judgment rendered that plaintiff in this cause has exhausted his administrative remedies as required by law.

Carl L. Shipley

Of Counsel:

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1194

JEROME FELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his separation, for reasons of physical disability, from his position as an Engineering Technician at the Naval Station Applied Science Laboratory in Brooklyn, New York. The Court of Claims dismissed the action on the ground that petitioner had failed to exhaust his administrative remedies when he did not appeal to the Board of Appeals and Review of the Civil Service Commission from the determination of the Commission's New York Regional Office (Appendix, *infra;*[1] see *Pine* v. *United States,* 371 F. 2d 466 (Ct. Cl.)). The Regional Office had concluded that petitioner's separation did not constitute an adverse personnel action within the Commission's jurisdiction because his application for disability retirement had been approved and he had been awarded a monthly annuity (App., *infra,* p. 5).

[1] Since the opinion of the Court of Claims is not printed in its entirety in the petition, we are printing it as an appendix to this memorandum.

In determining that petitioner had failed to exhaust his administrative remedies, the court below agreed with the Trial Commissioner's rejection, following a hearing, of petitioner's assertion that he had sent a letter to the Board on May 14, 1965, seeking review of the Regional Office's decision. (App., *infra*, pp. 3–4, 15–16). Although petitioner's attorney had theretofore conceded the "failure to file a timely appeal" to the Board, petitioner produced at the hearing a carbon copy of the asserted May 14, 1965, letter, which he said he had recently discovered (*id.* at 9, 11–13). The testimony of a qualified expert in questioned documents, however, showed that there was a substantial possibility that the carbon copy, and therefore the original, had been typed in 1967 rather than 1965 (*id.* at 14–15). Furthermore, a diligent search of the records of the Civil Service Commission in June 1967 failed to disclose any letter of appeal from petitioner to the Board dated on or about May 14, 1965 (*id.* at 13–14). Upon "careful review of the entire record, and upon consideration of the demeanor of the witnesses", the Trial Commissioner found that petitioner had not taken an appeal from the Regional Office's decision (*id.* at 15–16).

There is no reason for further review of this essentially factual issue. The Trial Commissioner's finding, adopted by the Court of Claims, has substantial support in the record, and the petition raises no legal issue of recurring importance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

APPENDIX

In the United States Court of Claims

No. 217–66

(Decided November 15, 1968)

JEROME FELD *v.* THE UNITED STATES

Rufus W. Peckham, Jr., for plaintiff. *Carl L. Shipley,* attorney of record. *Shipley, Akerman & Pickett,* of counsel.

Judith Yannello with whom was *Assistant Attorney General Edwin L. Weisl, Jr.,* for defendant. *Katherine H. Johnson,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

OPINION

PER CURIAM: This case was referred to Trial Commissioner Roald A. Hogenson with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57(a). The commissioner has done so in an opinion and report filed on February 16, 1968. Exceptions to the commissioner's findings and recommended conclusion of law were filed by plaintiff and the case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court agrees

with the commissioner's opinion, findings and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case. Therefore, plaintiff is not entitled to recover and the petition is dismissed.

Opinion of Commissioner

Hogenson, *Commissioner:* Plaintiff requests judgment against defendant for loss of salary on account of his allegedly illegal discharge on February 12, 1965, from civilian employment as an Engineering Technician, Applied Science Laboratory, U.S. Naval Station, Brooklyn, N.Y. After an agency hearing, the Commanding Officer of the Laboratory on February 4, 1965, issued to plaintiff his final decision and notice of separation for physical disability, sustaining the alleged basis for the proposed separation. Plaintiff was advised that he was eligible for disability retirement and that he would have to apply for such within 1 year of the effective date of his separation, the effective date being the end of the date on February 12, 1965. Plaintiff was notified that he could either appeal through channels to the Secretary of the Navy, or directly to the New York Regional Office of the U.S. Civil Service Commission. In addition, plaintiff was advised that for further information concerning his appeal rights, he should get in touch with his administrative department head, or the Industrial Relations Office of the New York Naval Shipyard, or the New York Regional Office of the U.S. Civil Service Commission.

At first plaintiff appealed his separation for disability to the Department of the Navy, but withdrew the same, and on April 12, 1965, appealed to the New York Region, U.S. Civil Service Commission.

In the meantime, plaintiff had on February 16,

1965, submitted his application for disability retirement on the standard form to the Bureau of Retirement and Insurance, Civil Service Commission, and on April 22, 1965, his application was approved by the Bureau, and plaintiff was awarded a monthly annuity. Accordingly, the Laboratory amended plaintiff's personnel record of separation for disability, and issued to plaintiff its notification of personnel action that he was retired for disability effective February 12, 1965. Apparently plaintiff has been receiving disability retirement payments because his petition seeks recovery for loss of salary minus disability retirement benefits so far received.

On May 10, 1965, the New York Region, Civil Service Commission, advised plaintiff in writing of the above-stated events concerning plaintiff's retirement for disability, and stated further as follows:

> In the premises, it does not appear that you were adversely affected as this term is used in Part 752–B of the Regulations so as to create any right of appeal to this office. The regulations apply to discharge, suspension for more than 30 days, furlough without pay, and reduction in rank or compensation. Section 752.103 (b), however, excludes from coverage (1) a decision of the Commission and (2) an action taken by an agency pursuant to instructions from the Commission.
>
> Accordingly, the action of the Laboratory, based on the Commission's decision in respect to your voluntary application for disability retirement, is not an adverse personnel action and there is no right of appeal to this office. Therefore, we no longer have appellate jurisdiction over your case and can take no further action on your appeal of April 12, 1965.

In accordance with the court's order of remand, entered May 26, 1967, hereinafter quoted in finding

10, the sole issue now presented is whether or not plaintiff has exhausted his administrative remedies. As directed by the court, a trial has been held on that issue.

After a full review of the record and upon consideration of the respective requested findings of fact and briefs of the parties, it is my opinion based upon the following detailed and ultimate findings of fact, that plaintiff failed to exhaust his administrative remedies, and that plaintiff's petition should be dismissed. *Pine* v. *United States,* 178 Ct. Cl. 146, 371 F. 2d 466 (1967), and cases therein cited.

Findings of Fact

1. On March 6, 1967, defendant's motion (filed September 20, 1966) and plaintiff's cross-motion (filed October 13, 1966) for summary judgment were submitted to the court by the parties without oral argument, and on March 24, 1967, the court entered the following order:

> This case comes before the court on defendant's motion and plaintiff's cross-motion for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, it is concluded that plaintiff is not entitled to recover on the ground that plaintiff failed to exhaust his administrative remedy when he did not appeal to the Board of Appeals and Review of the Civil Service Commission from the decision of the New York Region, Civil Service Commission, dated May 10, 1965, and on the basis of the decision of this court in Pine v. United States, Ct. Cl. No. 203–65, decided January 20, 1967.
>
> IT IS, THEREFORE, ORDERED that defendant's motion for summary judgment be and the same is granted, plaintiff's cross-motion be and the same is denied and the petition is dismissed.

2. Plaintiff's petition, filed June 23, 1966, contains no allegation that plaintiff appealed to the Board of Appeals and Review of the Civil Service Commission, or to the Commission itself, from the decision of the New York Region, Civil Service Commission, dated May 10, 1965.

3. In its brief in support of its above-mentioned motion for summary judgment, defendant asserted that plaintiff did not appeal the May 10, 1965, decision of the New York Region to the Board of Appeals and Review.

4. In his brief in support of his cross-motion for summary judgment, plaintiff stated that he agreed with defendant's statement of facts except to the extent that that statement conflicted with allegations in plaintiff's petition and in the documents and exhibits filed in the case. The only documents or exhibits then filed in this case were those attached to defendant's motion and plaintiff's cross-motion for summary judgment, none of which made any mention of any attempt on the part of the plaintiff to appeal to the Board of Appeals and Review.

5. On March 28, 1967, plaintiff filed his petition for reconsideration and rehearing of the decision set forth in the above-quoted order of the court, entered March 24, 1967. Plaintiff stated in pertinent part as follows:

> As plaintiff understands the Tucker Act, 28 USC 1491, plaintiff is entitled to a trial *de novo* in this Court in the exercise of its judicial responsibilities under Article III of the Federal Constitution.
>
> There is nothing in the Tucker Act which would deprive plaintiff of his right to a trial *de novo* on grounds of failure to exhaust administrative remedies, * * * the Civil Service Commission, New York Region, refused to take jurisdiction of plaintiff's appeals upon what

plaintiff alleges to be wholly erroneous grounds, i.e., voluntary application for disability retirement.

6. On March 31, 1967, plaintiff's attorney wrote to the Board of Appeals and Review, Civil Service Commission, and requested that the Commission permit plaintiff to take "a further administrative appeal in order to exhaust his administrative remedies, which is the basis for the United States Court of Claims decision not to hear his case, per the attached Order." The letter indicated that a carbon copy was supplied to plaintiff personally.

7. On April 11, 1967, plaintiff filed a motion for leave to file a supplement to his petition for reconsideration and rehearing. The proposed supplement consisted of two affidavits, both dated March 29, 1967, one executed by plaintiff, and the other by one Michael Gennone who did not appear as a witness at the trial. Plaintiff's affidavit is to the effect that when he received the decision letter, dated May 10, 1965, from the New York Regional Office, he wrote on May 14, 1965, to the Board of Appeals and Review of the Civil Service Commission, complaining of the dismissal of his appeal and requesting a determination.

8. By letter dated May 2, 1967, the Board of Appeals and Review advised plaintiff's attorney that under Civil Service Commission regulations, plaintiff had 7 days from the decision dated May 10, 1965, of the New York Regional Office to appeal to the Board, and that the Board could extend such time limit when a party shows that circumstances beyond the control of the party prevented the filing of the appeal within the time limit set. The Board granted plaintiff until May 22, 1967, to show cause why plaintiff's pending attempt to appeal to the Board should not be denied because of untimeliness.

9. On May 17, 1967, plaintiff's attorney by letter replied to the Board, set forth the second of the above-quoted paragraphs of the May 10, 1965, decision letter of the New York Regional Office, and argued that such letter told plaintiff that he had no appeal rights, thus preventing a timely appeal. Plaintiff's attorney further stated that plaintiff's "failure to file a timely appeal was due in large part to official advice that he had no right of appeal." However, there were attached to such letter and made a part thereof without further comment, copies of the affidavits of plaintiff and Mr. Gennone, and plaintiff's attorney advised that they had been filed with the court as a proposed supplement to plaintiff's petition for reconsideration and rehearing. Thus, the Board was apprised of plaintiff's purported appeal letter of May 14, 1965.

10. On May 26, 1967, the court issued its order allowing plaintiff's motion for leave to file supplement to his petition for reconsideration and rehearing, and it was further ordered:

> * * * that the order entered herein on March 24, 1967, be and the same is vacated and withdrawn and plaintiff's petition for reconsideration and rehearing is allowed in that this case is remanded to the trial commissioner for trial on the issue of whether or not plaintiff has exhausted his administrative remedies.

11. On June 7, 1967, plaintiff filed his motion for call on the Department of the Navy for a transcript of the hearing held on Tuesday, March 23, 1965, at the Applied Science Laboratory, Brooklyn, N.Y., on plaintiff's complaint of religious discrimination.

This hearing was held by the agency as a result of plaintiff's letter complaint, dated March 8, 1965, to the Commanding Officer of the Laboratory, to the effect that his separation for disability resulted from the animosity held and discrimination practiced by his

supervisors because of plaintiff's religious convictions. In his appeal to the New York Regional Office, plaintiff advised that in addition to a rehearing on his separation for disability, he was requesting a rehearing of the agency hearing relating to his allegation that discrimination was the cause of his disability separation.

12. Defendant filed an objection to plaintiff's motion for call on the grounds that the only issue to be tried was whether plaintiff exhausted his administrative remedies by appeal of the May 10, 1965, decision of the New York Regional Office to the Board of Appeals and Review.

Plaintiff's motion for call was denied by the trial commissioner on June 16, 1967, and no request for review by the court was filed.

13. On June 30, 1967, the Board of Appeals and Review declined to allow plaintiff's request of March 31, 1967, for review of the May 10, 1965, decision of the New York Regional Office, stating in part as follows:

> In view of the foregoing record, which shows that Mr. Feld made no effort to pursue his administrative appeal rights, or to ascertain what those appeal rights were, prior to dismissal of his court suit, it must be concluded that Mr. Feld chose not to pursue his administrative remedies by appealing to the Board. Therefore, it is the decision of the Board that no basis exists for accepting the untimely appeal of March 31, 1967, from the previous decision of the New York Region, U.S. Civil Service Commission, dated May 10, 1965, in Mr. Feld's case. Accordingly, his request is denied.

14. On August 23, 1967, defendant filed its motion for issuance of a subpoena duces tecum to require plaintiff to bring to the trial, then set for Septem-

ber 8, 1967, at Washington, D.C., a copy of the May 14, 1965, letter to the Board of Appeals and Review, mentioned by plaintiff in his affidavit filed in this court as a supplement to his petition for reconsideration and rehearing. This motion was allowed by the trial commissioner, and a subpoena duces tecum was issued and served on plaintiff on September 6, 1967.

15. At the trial session on September 8, 1967, plaintiff was the only witness called. On direct examination by his attorney, plaintiff testified that he was the plaintiff in this case, that he received a copy of the May 10, 1965, decision letter of the New York Regional Office (in evidence as plaintiff's exhibit 3), and that he appealed the action of the New York Region to the Board of Appeals and Review. He was then asked if he had a copy of the letter to the Board, and upon an affirmative reply, was requested to and did produce plaintiff's exhibit 4. He then testified that such letter was composed and posted on May 14, 1965, and that Isaac Goins and Michael Gennone were present at the time. Plaintiff further stated that he never received any acknowledgment from the Board. Upon inquiry by his attorney, plaintiff stated the morning of trial was the first time he advised his attorney that he had the copy of the letter (plaintiff's exhibit 4), and that plaintiff's attorney had never seen the letter prior to that day.

On cross-examination, plaintiff stated that he typed the May 14, 1965, letter himself at his home, where he had three or four typewriters at the time. He could not identify the brand of typewriter used, nor remember where he had purchased the typewriters. He said he found plaintiff's exhibit 4 in a brown briefcase about a week ago. He didn't advise his attorney of the find until the morning of trial. When asked why he

didn't, he responded "Why should I?" and "It seemed childish." He couldn't remember whether he still had the typewriter used on the questioned document, but stated that he presently had "one or two" typewriters, but when pressed as to which number, he could not say. He said that he had tried to send his attorney everything he had pertaining to his case. He denied that he prepared the questioned document within the past month, and asserted that he had prepared it on the date it bears, and had placed the original in the mailbox on that date. He stated he did not inquire from the Board as to why he had not received an acknowledgment because he had taken his discrimination complaint to the President's Committee on Equal Employment Opportunity.

At the conclusion of the September 8, 1967, trial session, the trial commissioner took possession of plaintiff's exhibit 4 at defendant's request to avoid its loss pending investigation of such document by the defendant. The trial commissioner set the second day of trial for a date in November 1967, with the understanding that defendant would proceed at that time with its testimony and evidence, and that at a subsequent date plaintiff could call Mr. Goins or Mr. Gennone or any other witness in rebuttal. On September 8, 1967, the trial commissioner entered an order that plaintiff's exhibit 4 be held by the clerk, not to be released to any person except on order of the court or the trial commissioner.

16. Plaintiff's exhibit 4 is a carbon copy of a typewritten letter, dated "May 14, 1965," addressed to "Chairman, Board of Appeals, U.S. Civil Service Comm., Washington, D.C.," with typewritten conclusion "Yours truly, Jerome Feld, 92 Powell St., Brooklyn 12, N.Y.," reading in the body as follows:

I wish to complain to you of the arbitrary and improper action of your N.Y. Regional Office in refusing to review my separation from the Naval Applied Science Lab, here in Brooklyn. This decision is contained in their letter of May 10th, which leads me to infer that they have no jurisdication [sic] in this case.

This should not be so, since I was improperly and involuntarily dismissed after my Civil Service rights were violated, and after I had filed my complaint of religious discrimination which is still pending with the President's Committee on Equal Employment Opportunity.

Upon separation, I immediately filed my appeal with the Navy Department. Then since there is a time limit on filing for disability benefits under the law, I had no other alternative but to protect my rights and file for such benefits, not knowing how long my appeals would take. Not hearing from the Navy within the 60 day time limitation, I took my appeal over to the Civil Service Comm. Both the Navy and the Civil Service Comm., evidently did nothing to investigate my complaints and claims. Had they acted properly I might have been reinstated long before the April 22nd, decision of the Bur. of Retirement, which they seized upon to change by some mysterious beauty, which even today I do not understand, my Personnel Action form 50, from retirement disability to separation disability.

Based upon this hocus-pocus, they now claim they can not investigate my improper dismissal, nor do I have any further rights in this matter. I would therefore, request your office to review this matter, and order the N.Y. Region to grant me my rights under present regulations.

17. Diligent search of the records of the Civil Service Commission was made in June 1967, and such search failed to disclose a letter of appeal from plain-

tiff to the Board of Appeals and Review, dated on or about May 14, 1965.

18. The second trial session was held on November 27, 1967, at which plaintiff was represented by his attorney but did not appear in person. Plaintiff advised that he had no further testimony or evidence to offer. The only witness called was one by defendant, Mr. Warren Marshall, Special Agent, Federal Bureau of Investigation, a qualified expert in questioned documents. For the preparation of his testimony, plaintiff's exhibit 4 (the questioned document) had been by order of the trial commissioner released to defendant, and defendant had withdrawn other exhibits in evidence, all of which were returned in open court.

19. Mr. Marshall examined the following exhibits to make a comparison of the typewriting involved:

(a) Plaintiff's exhibit 4, the questioned document, bearing date of May 14, 1965;

(b) Plaintiff's exhibit 6, the original of the affidavit of plaintiff, dated March 29, 1967, which was attached to plaintiff's supplement to his petition for reconsideration and rehearing filed in this case;

(c) Defendant's exhibit 13, the original of a letter from plaintiff to his attorney, dated March 29, 1967;

(d) Defendant's exhibit 12, photostatic copy of the original of a letter from plaintiff to the Employee-Management Relations Branch, Navy Department, dated May 10, 1965;

(e) Defendant's exhibit 14, photostatic copy of the original letter from plaintiff to the Vice President, dated February 19, 1965; and

(f) Defendant's exhibit 15, photostatic copy of the original of the letter of appeal from plaintiff to the New York Regional Office, Civil Service Commission, dated April 12, 1965.

20. As is clearly established by the testimony of Mr. Marshall, plaintiff's exhibit 6 and defendant's ex-

hibit 13, both typewritten in 1967, were prepared on the same typewriter as was the questioned document, plaintiff's exhibit 4, purportedly written in 1965. This typewriter had elite type, spaced 12 letters to the inch. All three of the documents mentioned in this paragraph bore the same defects with respect to the imprint of alphabetical letters on the document. resulting from damage to or wear of the type, so plainly identical that the same typewriter must have been used.

It is also clearly established that the other three documents (defendant's exhibits 12, 14, and 15, all typewritten in 1965) were prepared on the same typewriter, but a different typewriter from that mentioned in the first paragraph of this finding. This second typewriter had pica-sized type, spaced 10 letters to the inch. Various defects in the imprint of letters were identical on these three documents.

Thus, it is apparent that the questioned document was prepared on the same typewriter which plaintiff used to type the 1967 documents, whereas a different typewriter was used by him to prepare the three documents prepared by him in 1965.

21. At the trial session on November 27, 1967, plaintiff's attorney spontaneously stated for the record that plaintiff "has specifically waived his right to be present at these proceedings this morning."

The trial was completed that morning, without further testimony being offered, and without any request by plaintiff's attorney for an opportunity to present any rebuttal testimony or evidence.

Ultimate Finding of Fact

22. Upon careful review of the entire record, and upon consideration of the demeanor of the witnesses, it is concluded that there is no credible evidence that

plaintiff appealed from the May 10, 1965, decision of the New York Regional Office to the Board of Appeals and Review of the Civil Service Commission, and that there was no abuse of discretion by the Board in denying as untimely plaintiff's request of March 31, 1967, that the Board entertain an appeal.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

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